Filed 3/27/19 Lopez v. Welk Resort Group, Inc. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARIA LOPEZ et al., Plaintiffs and Respondents, v. WELK RESORT GROUP, INC. et al., Defendants and Appellants.	D073675 (Super. Ct. No. 37-2017-00026674-CU-BT-NC)

APPEAL from an order of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Goodwin Procter and Brooks R. Brown, William M. Jay, David J. Zimmer; Welk Resort Group, Inc. and Ronald E. Naves, Jr. for Defendants and Appellants.

Paschall Law and Patrick D. Paschall; Williams Iagmin and Jon R. Williams for Plaintiffs and Respondents.

Defendants Welk Resort Group, Inc. and Welk Resorts Platinum Owners Association (Welk) appeal an order denying Welk's petition to compel arbitration of an action filed by Plaintiffs Maria Lopez and Javier Torres-Chavez against Welk. In that

action, Plaintiffs assert statutory and common law claims against Welk based on allegations that Welk misrepresented and omitted material facts to induce Plaintiffs into purchasing an interest in a vacation timeshare program.

Welk contends that this dispute belongs in arbitration pursuant to a provision in the timeshare purchase agreement requiring the parties to submit claims arising out of the agreement to a "dispute or claim resolution process" overseen by a "neutral or impartial person" and governed by "reasonable and fair" rules and procedures. According to Welk, the trial court erred when it concluded that this dispute resolution provision is too uncertain and indefinite to constitute an arbitration agreement. Welk further contends the trial court erred in finding, as an alternative basis for denying Welk's petition to compel arbitration, that the dispute resolution provision is unconscionable and unenforceable.

We agree with the trial court that the material terms of the dispute resolution provision are unascertainable and do not evince an agreement to arbitrate. Accordingly, we affirm. Because Welk has not carried its burden of proving the existence of an arbitration agreement, we do not address the trial court's alternative finding of unconscionability.

I

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Timeshare Purchase Agreement*

Welk is the owner and operator of a vacation timeshare program for properties in California, Missouri, and Mexico. In exchange for free tickets to local attractions, Plaintiffs agreed to attend a presentation during which Welk attempted to sell them

interests in its timeshare program. According to Plaintiffs, Welk engaged in "high pressure" and "misleading sales tactics" during this presentation, including "misrepresenting" the duration of the presentation, dissuading Plaintiffs from reviewing the terms of the sale offer, and presenting the sale offer on a "take it or leave it" basis.

At the end of the presentation, Plaintiffs executed a ten-page purchase and sale agreement (Agreement) to buy an interest in Welk's timeshare program. Plaintiffs financed the purchase through Welk by executing a promissory note and security agreement (Note) in favor of Welk. The Agreement allowed Plaintiffs to cancel with no penalty or obligation within seven days of acceptance, but Plaintiffs did not do so.

Paragraph 13 of the Agreement contains a dispute resolution provision (Dispute Resolution Provision) that provides, in full, as follows:

> 13. DISPUTE RESOLUTION. The parties agree that any dispute between the parties arising out of this Agreement shall be subject to the following dispute resolution rules:
>
> (1) The Seller shall advance the fees necessary to initiate the dispute or claim resolution process, with the costs and fees, including ongoing costs and fees, if any, to be paid as agreed by the parties and if they cannot agree then the costs and fees are to be paid as determined by the person or persons presiding at the dispute or claim resolution proceeding or hearing.
>
> (2) There shall be a neutral or impartial person to administer and preside over the claim or dispute resolution process.
>
> (3) The parties shall appoint or select the person to administer and preside over the claim or dispute resolution process within no more than 60 days from initiation of the claim or dispute resolution process or hearing. The person appointed, selected, designated, or assigned to preside may be challenged for bias.
>
> (4) The venue of the claim or dispute resolution process shall be San Diego County, California, unless the parties agree to some other location.

(5) The claim or dispute resolution process shall be promptly and timely commenced, which shall be by a date agreed upon by the parties, and if they cannot agree, a date shall be determined by the person presiding over the dispute resolution process.

(6) The claim or dispute resolution process to be [*sic*] conducted in accordance with rules and procedures that are reasonable and fair to the parties.

(7) The claim or dispute resolution process shall be promptly and timely concluded, including the issuance of any decision or ruling following the proceeding or hearing.

(8) The person presiding at the claim or dispute resolution process shall be authorized to provide all recognized remedies available in law or equity for any cause of action that is the basis of the proceeding or hearing. The parties may authorize the limitation or prohibition of punitive damages.[1]

Two other provisions of the Agreement are material to this appeal. First, Paragraph 12 (b) outlines the parties' rights and obligations if the buyer defaults *before* the close of escrow. It grants Welk a right to terminate the Agreement upon default by providing notice of termination to the buyer, at which point the buyer may provide an objection notice disputing the determination of default. After outlining these rights and obligations, Paragraph 12 (b) provides as follows: "In the event that Purchaser timely delivers to Escrow Holder the Objection Notice, the dispute regarding the disposition of Purchaser's funds deposited with Seller, and every other cause of action which has arisen between Seller and Purchaser under this Agreement shall be settled *by arbitration pursuant to Paragraph 13*(*b*), below." (Italics added.)

---

1 Most of the paragraphs in the Dispute Resolution Provision are not separated by spaces in the Agreement. However, we have added spaces between the paragraphs where necessary to make the Dispute Resolution Provision easier to read.

Second, Paragraph 6 outlines the parties' rights and obligations if the buyer defaults *after* the close of escrow. In the event of a post-closing default, the principal and accrued interest are immediately payable at Welk's election and, after providing the buyer a notice of default and an opportunity to object, Welk may repossess the buyer's interest in the timeshare program. Alternatively, Welk may enforce its security interests "by (i) exercise of [a] power of sale in [a] commercially reasonable manner, (ii) any other collection remedy provided for under Article 9 of the Commercial Code, (iii) *suit at law*, or (iv) any other manner authorized by law." (Italics added.)

2. *The Parties' Dispute*

Years after accepting the Agreement, Plaintiffs informed Welk they desired to terminate their interests in the timeshare program. Welk then filed an arbitration demand against Plaintiffs with Judicial Arbitration and Mediation Services, Inc. (JAMS), alleging that Plaintiffs had defaulted on their monthly payments and breached their obligations under the Agreement and the Note. Plaintiffs objected to the arbitration demand on grounds that the parties never agreed to arbitrate their disputes. As a result of Plaintiffs' objections, JAMS declined to hear the matter and advised the parties it would resume administration only if it were presented with a court order or agreement directing JAMS to administer the matter. There is no indication in the record that Welk pursued its claims against Plaintiffs any further or sought a court order compelling arbitration of its claims.

However, Plaintiffs filed a lawsuit of their own against Welk in superior court, alleging that Welk had misrepresented and omitted material facts about the timeshare program during its sales presentation. Welk petitioned to compel arbitration of Plaintiffs'

claims and Plaintiffs opposed, again arguing that the parties did not agree to arbitrate their disputes with one another. In particular, Plaintiffs argued that the Dispute Resolution Provision is not an agreement to arbitrate because it does not use the term "arbitration" or inform the parties that they are waiving their rights to a jury trial.

In the alternative, Plaintiffs contended that the Dispute Resolution Provision is unconscionable. Plaintiffs argued that the Dispute Resolution Provision is procedurally unconscionable because it is "hidden" within the "lengthy, boilerplate" Agreement, which Welk presented to Plaintiffs on a "take it or leave it" basis. Plaintiffs also argued that the Dispute Resolution Provision lacks mutuality because, assuming it constitutes an arbitration agreement, it requires Plaintiffs to arbitrate their disputes with Welk, but does not require Welk to arbitrate its disputes with Plaintiffs. Plaintiffs argued that the lack of mutuality is evidenced by Paragraph 6 of the Agreement, which, as noted *ante*, permits Welk to enforce its security interest by a "suit at law" if the buyer defaults.

The trial court agreed with Plaintiffs and denied Welk's petition to compel arbitration on both grounds. First, the court concluded that the Dispute Resolution Provision is not an agreement to arbitrate. As the court explained, the Dispute Resolution Provision does not constitute an unambiguous waiver of the parties' rights to a jury trial and, furthermore, "it is not clear from the language of that provision what the dispute or claim resolution process is as those terms are not defined." The court also found that the Dispute Resolution Provision, to the extent it is an agreement to arbitrate, is unconscionable. According to the court, the Dispute Resolution Provision is "procedurally and substantively unconscionable for the following reasons: (1) the

'Dispute Resolution' clause is set forth in an adhesion contract; (2) the placement of the provision and vague ambiguous [*sic*] word choice; and (3) the fact that only plaintiffs would be bound by the provision whereas Welk has the ability to pursue alternative forums."

II

DISCUSSION

1. *Legal Standards*

" 'The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract.' " (*City of Vista v. Sutro & Co.* (1997) 52 Cal.App.4th 401, 407.) "Whether the parties formed a valid agreement to arbitrate is determined under general California contract law." (*Ibid.*; see *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*) ["In California, '[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.' "].)

The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the opposing party bears the burden of proving any defense. (*Pinnacle, supra*, 55 Cal.4th at p. 236; *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1106.) Where the evidence is not in conflict, we apply de novo review to the denial of a petition to compel arbitration. (*Pinnacle*, at p. 236; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173.)

2. *Existence of an Arbitration Agreement*

a. *Uncertainty of the Contract*

Plaintiffs contend that the trial court properly denied Welk's petition to compel arbitration because the Dispute Resolution Provision is so vague and ambiguous that its objective is unascertainable. In particular, Plaintiffs point out that the Dispute Resolution Provision does not identify "arbitration" as the chosen method of dispute resolution, inform the parties they are waiving their rights to a jury trial, or expressly require the person presiding over the process to issue a final and binding decision. Therefore, Plaintiffs argue, Welk has not established the existence of an enforceable agreement between the parties to arbitrate any disputes arising out of the Agreement, including the causes of action Plaintiffs have asserted in this litigation.

"Contract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense.' [Citations.] 'If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation.' [Citation.] 'Mutual consent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.' " (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208 (*Bustamante*); see also Civ. Code, § 1580.)

" 'Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable.' [Citations.] 'The terms of a contract are reasonably certain if they provide a basis for

determining the existence of a breach and for giving an appropriate remedy.' [Citations.] But '[i]f . . . a supposed "contract" does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract.' " (*Bustamante*, *supra*, 141 Cal.App.4th at p. 209; Civ. Code, §§ 1598, 3390.)

Applying these standards, we agree with Plaintiffs that the procedures set forth in the Dispute Resolution Provision are so vague and ambiguous as to be unascertainable and, therefore, unenforceable. As Plaintiffs note, the Dispute Resolution Provision does not use the terms "arbitration" or "arbitrator." Rather, it requires the parties to submit their disputes to an undefined "dispute resolution process." A "dispute resolution process" can take myriad forms, both judicial and nonjudicial, including civil litigation, negotiation, neutral factfinding, organizational ombudsman, voluntary or mandatory settlement conferences, mini-trial, private judging, early neutral evaluation, judicial arbitration, and contractual arbitration. (See Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2018) ¶ 1:2 CAADR Ch. 1-A.) In other words, arbitration is one *method* of dispute resolution, but "arbitration" and "dispute resolution" are "not interchangeable." (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 692 (*Cheng-Canindin*); see *Lindsay v. Lewandowki* (2006) 139 Cal.App.4th 1618, 1623 [settlement stipulation uncertain, in part, because it described a dispute resolution procedure both as "mediation" and "binding arbitration"].)

Standing alone, "the failure of the agreement to identify the grievance procedure as 'arbitration' is not fatal to its use as a binding mechanism for resolving disputes

between the parties. [Citations.] [¶] More important is the nature and intended effect of the proceeding." (*Painters Dist. Council No. 33 v. Moen* (1982) 128 Cal.App.3d 1032, 1036 (*Painters*).) However, the nature and intended effect of the "dispute or claim resolution process" discussed in the Dispute Resolution Provision do not assist Welk in proving the existence of an agreement to arbitrate, as they are equally as vague as the undefined term "dispute or claim resolution process" (if not more so).

For instance, the Dispute Resolution Provision states only in general terms that the "process [shall] be conducted in accordance with rules and procedures that are reasonable and fair to the parties." But what are those rules? Arbitration rules? Mediation rules? Settlement conference rules? Something else? Who decides whether the rules are "reasonable and fair"? And what happens if the parties disagree as to the "reasonable and fair" rules that govern the proceeding? The Dispute Resolution Provision does not answer any of these questions. (*Flores v. Nature's Best Distribution* (2016) 7 Cal.App.5th 1, 10-11 [document was ambiguous and not an agreement to arbitrate, in part, because it did not identify the applicable arbitration rules].)

In fact, we have no basis from which to discern even the most fundamental aspects of the proceeding to which the parties have "agreed" to submit their disputes. The Dispute Resolution Provision merely provides that the parties must appoint or select a "neutral or impartial person" to "administer and preside over [a] claim or dispute resolution process." The Provision's circular reference to a "dispute resolution process" when purporting to *describe* the process brings us no closer to discerning the parties'

intentions, rights, or obligations. (*Westside Sane/Freeze v. Ernest W. Hahn, Inc.* (1990) 224 Cal.App.3d 546, 558 [circular references are "indefinite" and "acutely ambiguous"].)

There are other aspects of the Dispute Resolution Provision that lead us to conclude that Welk has not established the existence of an enforceable arbitration agreement. "[A]lthough arbitration can take many procedural forms, a dispute resolution procedure is not an arbitration unless there is [1] a third party decision maker, [2] a *final and binding decision*, and [3] a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision." (*Chening-Canindin*, *supra*, 50 Cal.App.4th at pp. 684-685, italics added.) As Plaintiffs correctly note, the Dispute Resolution Provision does not include one of these essential attributes of arbitration—namely, the issuance of a final and binding decision.[2] (See *American Federation of State, County & Municipal Employees, Local 1902, AFL-CIO v. Metropolitan Water Dist. of Southern Cal.* (2005) 126 Cal.App.4th 247, 259-260 [memorandum of understanding requiring disputes to be submitted to a neutral hearing officer for a purportedly "final and binding" decision, but permitted the officer's decision to be appealed, lacked finality and was not an enforceable agreement to arbitrate].)

---

2 We do not mean to suggest that an agreement must always state that the arbitrator will issue a "final and binding" award to constitute an enforceable agreement to arbitrate, as Plaintiffs claim. On the contrary, the Supreme Court has suggested no such requirement exists. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 ["[I]t is the general rule that parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final."].) However, where the agreement at issue is so vague that the procedure to which the parties have agreed is itself unascertainable, as it is here, the presence or absence of language providing for a final and binding award may assist in determining whether an agreement to arbitrate exists.

Finally, the Dispute Resolution Provision does not inform the parties that they are waiving their constitutional rights to a jury trial by accepting the Provision. To be sure, an otherwise valid agreement to arbitrate will not be nullified merely because it lacks an express waiver of the parties' rights to a jury trial, as a jury waiver is implied by the very nature of an arbitration agreement. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 713.) However, the presence or absence of an express jury trial waiver may be relevant in assessing whether an agreement to arbitrate exists in the first place. (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569 [" 'Absent a clear agreement to submit disputes to arbitration, courts will not infer the right to a jury trial has been waived.' "]; see also *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 790.) Here, the Dispute Resolution Provision's silence on whether the parties are waiving their jury trial rights by accepting the Provision further undermines Welk's contention that the parties entered into an express agreement to arbitrate their disputes.

For all these reasons, the Dispute Resolution Provision—which does not refer to "arbitration" or an "arbitrator," mandate the issuance of a final and binding decision, identify the "reasonable and fair" rules applicable to the dispute resolution process, waive the parties' constitutional rights to a jury trial, or articulate the most basic aspects of the dispute resolution process—is uncertain, indefinite, and void. As such, it is not an enforceable agreement to arbitrate.

b. *Welk's Arguments*

Welk asserts five main arguments in support of its claim that the Dispute Resolution Provision is an agreement to arbitrate. We address each argument in turn.

First, Welk argues that the Dispute Resolution Provision does in fact require the person administering and overseeing the "dispute resolution process" to issue a final and binding decision. Specifically, Welk cites the following italicized portion of the Dispute Resolution Provision: "The claim or dispute resolution process shall be promptly and timely concluded, *including the issuance of any decision or ruling following the proceeding or hearing*." (Italics added.) Contrary to Welk's argument, however, the provision on which Welk relies merely contemplates the *possibility* of a decision or ruling. It does not *mandate* any such decision or ruling. Further, it says nothing about the finality or binding effect of any such decision or ruling.[3] As noted *ante*, "it is essential that arbitration judgments be both binding and final." (*A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470, 1474.)

Second, Welk asserts that the parties mutually consented to arbitrate their disputes, regardless of the Dispute Resolution Provision's omission of the term "arbitration," because, as noted *ante*, an arbitration agreement need not use the label "arbitration" to be enforceable. Welk relies on three cases in which courts have enforced arbitration agreements, even though they did not use the term "arbitration," and likens the Dispute Resolution Provision to the agreements in those cases. The cases on which Welk rely are

---

3 Welk contends the decision or ruling referenced in the Provision is impliedly final and binding; otherwise, the parties' "disputes" could never be "resolved." Welk is mistaken. Nonbinding decisions and rulings are commonplace features of many dispute resolution proceedings, including, for example, mini-trials, judicial arbitrations, and certain forms of judicial references. (Knight, Cal. Practice Guide: Alternative Dispute Resolution, *supra*, ¶ 3:199.6 CAADR Ch. 3(I)-F; *id.* at ¶ 4:35 CAADR Ch. 4-B; *id*. at ¶ 6:127 CAADR Ch. 6-C; Code Civ. Proc., § 644.)

readily distinguishable, however, and only further underscore the indefiniteness of the Dispute Resolution Provision and the lack of mutual consent in this case.

For instance, in *Silva v. Mercier* (1949) 33 Cal.2d 704, our Supreme Court was asked to determine whether the parties' collective bargaining agreement had been terminated. The court declined to address the matter, however, because a clause in the agreement mandated that the issue be resolved by a trade board. (*Id.* at pp. 708-709.) The trade board's decisions were "final" and, in the event of a deadlock, matters were to be settled by a mediator and then an arbitrator. (*Id.* at p. 708.) The *Silva* court determined that the clause must be enforced, irrespective of whether the trade board was "technically a common law or statutory arbitration or something akin thereto," because the agreement "provide[d] for the determination by a third person or persons of [a] proper matter to be settled and that the decision shall be final . . . ." (*Ibid.*) Unlike the agreement in *Silva*, the Dispute Resolution Provision does not require a third-party neutral to render a final and binding decision. Thus, it is lacking the core element of arbitral finality that was present in the agreement considered in *Silva*.

Likewise, in *Painters*, *supra*, 128 Cal.App.3d 1032, the issue presented was whether a provision in a collective bargaining agreement constituted an agreement to arbitrate. The agreement contemplated that unresolved disputes between the parties would be heard before a joint adjustment board for "a final and binding determination," and, if the board failed to reach a decision, would be referred to a "neutral arbitrator" to "render a 'final and binding decision.' " (*Id.* at p. 1036.) The *Painters* court rejected the defendant's argument that this procedure was "not a 'real arbitration' " merely because it

was not denominated an arbitration, instead concluding that the "board's decision was contemplated as a final ruling on the matter." (*Id.* at p. 1037.) Like the agreement in *Silva*, *supra*, 33 Cal.2d 704, the agreement at issue in *Painters* required a neutral body to issue a final and binding decision, whereas the Dispute Resolution Provision does not.

Welk's final case, *Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, is inapposite for similar reasons. In that case, the parties executed an agreement requiring them to participate in a mediation and, if it proved unsuccessful, the mediator had to choose between two "last and final demands" to be a "binding mediator judgment." (*Id.* at p. 731.) The parties called the procedure both "binding mediation" and a "mediation with a binding arbitration component following." (*Id.* at p. 729.) Our court rejected arguments that the parties did not mutually consent to the agreement and that the agreement was too uncertain to enforce. (*Id.* at pp. 732-736.) As we explained, the parties' description of the procedures that applied to the process, coupled with their actual participation in those procedures, gave rise to an enforceable agreement, even if the term "binding mediation" was uncertain when read in isolation. (*Id.* at pp. 733-734.) The Dispute Resolution Agreement bears little resemblance to the *Bowers* agreement. Unlike the *Bowers* agreement, the Dispute Resolution Agreement does not mandate a "binding" judgment, nor describe how the dispute resolution process is intended to operate. On the contrary, as discussed *ante*, it sets forth ill-defined (or rather, undefined) parameters that are too uncertain to establish an enforceable arbitration agreement.

Third, Welk contends that the Dispute Resolution Provision is an agreement to arbitrate because it could serve no other purpose. We disagree. The Provision could just

as easily describe other types of dispute resolution processes. Take voluntary judicial reference, for instance. "In a judicial reference, a pending court action is sent to a referee for hearing, determination and a report back to the court." (*Treo v. Kettner Homeowners Assn. v. Superior Court* (2008) 166 Cal.App.4th 1055, 1061.) A general reference directs the referee to try all issues in the action and empowers the referee to make a binding determination that "must stand as the decision of the court." (Code Civ. Proc., § 644, subd. (a).) Alternatively, a special reference authorizes the referee to make advisory findings "necessary to enable the court to determine an action or proceeding." (Code Civ. Proc., § 638, subd. (b); *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1522.)

Each of the vague strictures set forth in the Dispute Resolution Provision is consistent with a judicial reference. For example, the Dispute Resolution Provision contemplates that a "neutral or impartial person" chosen by the parties will "administer and preside" over the process. With a judicial reference, the referee is "agreed upon by the parties." (Code Civ. Proc., § 640.) The Dispute Resolution Provision sets San Diego County as the venue, but permits the parties to select a different venue. Once again, this is consistent with a judicial reference, in which "[h]earings are usually held wherever the parties and referee agree upon." (Knight, Cal. Practice Guide: Alternative Dispute Resolution, *supra*, ¶ 6:210 CAADR Ch. 6-C.) The Dispute Resolution Provision states that the dispute resolution process is to occur by a date agreed upon by the parties. With a voluntary judicial reference, the parties effectively dictate when the judicial reference begins because they must first file an agreement, stipulation, or motion requesting judicial reference. Finally, the Alternative Dispute Provision states that the parties shall

agree on a division of costs and fees for the proceedings. The referee fees for a voluntary judicial reference are "agreed by the parties," too. (Code Civ. Proc., § 645.1, subd. (a).) As this illustrative example makes clear, there is no merit to Welk's claim that arbitration is the sole possible objective of the Dispute Resolution Provision.

Fourth, Welk claims that Paragraph 12 (b) of the Agreement—a provision located *outside* the Dispute Resolution Provision—demonstrates that the parties intended the Dispute Resolution Provision to be an arbitration agreement. Paragraph 12 (b), which applies only if the buyer of a timeshare interest defaults before the close of escrow, provides that disputes relating to such pre-closing defaults "shall be settled by arbitration pursuant to Paragraph 13 (b), below." As Plaintiffs correctly note, Paragraph 13 (b)—the paragraph referenced in Paragraph 12 (b)—does not even exist. However, assuming this to be a clerical error, Paragraph 12 (b)'s fleeting reference to "arbitration" does not, standing alone, render the provisions of the Dispute Resolution Provision reasonably certain.

Indeed, just as a provision may be an agreement to arbitrate despite the absence of the label "arbitration," the presence of the label "arbitration" does not mean that a provision is an agreement to arbitrate. (*Elliott v. Ten Eyck Partnership v. City of Long Beach* (1997) 57 Cal.App.4th 495, 503 ["[T]he fact that a procedure is labeled as 'arbitration' does not mean that it is"]; see, e.g., *City of Shasta Lake v. County of Shasta* (1999) 75 Cal.App.4th 1, 11 ["Despite the fact the parties labeled their proceeding an arbitration, we treat it as a temporary judge proceeding."]; *National Union Fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709, 715 ["While the form of the

proceedings was denominated an arbitration, its substance was a reference."].) Rather, "[t]he law aspires to respect substance over formalism and nomenclature." (*Shasta*, at p. 11; *Heenan v. Sobati* (2002) 96 Cal.App.4th 995, 1103 ["[N]omenclature is not controlling"].) And here, the substance of the Dispute Resolution Provision (what little there is) does not mandate the core arbitral attribute of finality. Thus, we decline to find, based on a single reference to "arbitration" (outside of the Dispute Resolution Provision) and a citation to a nonexistent contract provision, that the Dispute Resolution Provision bears the substance of an agreement to arbitrate.

Finally, Welk contends we must construe ambiguities in favor of the existence of an agreement to arbitrate, given the strong state and federal policies favoring arbitration. We disagree. "While it is true that under the FAA [and state law], ' "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" ' [citations], that policy does not come into effect until a court has concluded that under state contract law, the parties entered into an agreement to arbitrate." (*Lopez v. Charles Schwab & Co., Inc.* (2004) 118 Cal.App.4th 1224, 1229; *Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1370 ["The strong policy in favor of arbitration may not be used to permit a party to enforce provisions of an arbitration agreement that, as here, either do not exist or were so poorly drafted that another party cannot be presumed to have agreed to them."].) This stems from "the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent,' [citation], and thus 'is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration.' " (*Granite Rock Co. v. International Brotherhood of Teamsters*

(2010) 561 U.S. 287, 299.) Thus, public policy does not alleviate Welk of its predicate burden of proving that the parties entered into an arbitration agreement.[4]

In sum, we conclude that Welk has not established the existence of an enforceable agreement to arbitrate. Accordingly, the trial court properly denied Welk's petition to compel arbitration of Plaintiffs' causes of action.[5]

---

4 Welk cites *Erickson v. Aetna Health Plans of Cal., Inc.* (1999) 71 Cal.App.4th 646 for the proposition that the presumption of arbitrability applies to the threshold question of whether an agreement to arbitrate exists. *Erickson* does not support Welk's position. In *Erickson*, "there [was] no dispute that the parties had a valid agreement which contained a clause providing for arbitration of disputes. The only question concern[ed] the proper *construction* of that clause, i.e., whether it require[d] arbitration or merely [made] it available at the option of the plan member." (*Id.* at p. 656.)

5 Because we conclude the parties have not agreed to arbitrate their disputes, we need not decide whether the Dispute Resolution Provision is unconscionable.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

GUERRERO, J.